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No. 93-___

In The

Supreme Court of the United States

October Term, 1993

ARVIDA REALTY SALES, INC., a Florida Corporation, ARSLP, INC., an Illinois Corporation, and ARVIDA REALTY SALES, LTD., a Delaware Limited Partnership,

Petitioners,

vs.

PATRICIA SEAMAN,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM F. KASPERS
(Counsel of Record)
FISHER & PHILLIPS
1500 Resurgens Plaza
945 E. Paces Ferry Road
Atlanta, Georgia 30326
(404) 231-1400

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Employer restructured a part of its workforce by converting all real estate sales employees to independent contractors. Such reduction in employee force was designed to reduce overall payroll costs, including costs associated with employment taxes, workers compensation, and benefits. A real estate sales employee who was 100% vested in employer's pension plan and had no current welfare benefit plan claims, refused to convert to independent contractor status, and refused continued association with the Company. Rather, she sued under Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), alleging employer's restructuring of its workforce, although in no manner personally directed toward her, constituted an illegal interference with her future participation in the employer's benefit plans.

1. Did the circuit court err in recognizing an implied ERISA "wrongful discharge" claim based solely upon loss of unaccrued, unvested, and prospective benefits?

2. Did the circuit court err in holding that ERISA Section 510 prohibits an employer from restructuring its workforce to reduce payroll costs where such costs include reduction of future employee benefits?

3. Does an employer who has an acknowledged and absolute right under ERISA to amend or terminate its benefit plans to eliminate employees' future plan participation, violate Section 510 of ERISA when it achieves the

QUESTIONS PRESENTED – Continued

same result by converting its employees to independent contractors?

4. Is the "business justification" defense unavailable to an employer in an ERISA Section 510 discrimination action, where an employer restructures its workforce to reduce payroll costs, including reduction of future employee benefits?

5. Does ERISA Section 510 create benefit plan vesting rights over and above vesting rights granted in the substantive portions of ERISA or in plan documents?

THE PARTIES AND RULE 29.1 LIST

The parties to the proceeding below appear in the case caption. Pursuant to Supreme Court Rules 14.1(b) and 29.1, Petitioners Arvida Realty Sales, Inc., ARSLP Inc., and Arvida Realty Sales, Ltd. list the following entities as related parent companies and nonwholly owned subsidiaries:

3rd Party Equity Clubs
3rd Party Joint Ventures
A/J Acquisition Company
A/J Development Associates
ABR Communications, Inc.
ARLP, Inc.
Arvida Builders, Inc.
Arvida Company
Arvida Contractors-II, Inc.
Arvida Contractors-II, L.P.
Arvida Contractors, Inc.
Arvida Contractors Limited Partnership
Arvida/Heathrow Cable, Inc.
Arvida/Heathrow Club, Inc.
Arvida/Heathrow Developers Limited Partnership
Arvida/Heathrow Management, Inc.
Arvida/Heathrow Realty Sales, Inc.
Arvida/JMB Associates
Arvida/JMB Associates Limited Partnership-II
Arvida/JMB Development Partners, L.P.
Arvida/JMB Investors
Arvida/JMB Limited Partnership
Arvida/JMB Managers, Inc.
Arvida/JMB Managers-II, Inc.
Arvida/JMB Partners, L.P.

THE PARTIES AND RULE 29.1 LIST – Continued

Arvida/JMB Partners, L.P.-II
Arvida/JMP Partners
Arvida Management Company of Naples
Arvida Management Limited Partnership
Arvida Management-II, L.P.
Arvida Managers-II, Inc.
Arvida Managers, Inc.
Arvida Realty Limited Partnership
Arvida Realty Sales, Inc.
Arvida Realty Sales Limited Partnership
Arvida Realty Sales of Georgia, Inc.
Boca Raton Communications Limited Partnership
Brandon Communications, Inc.
Broken Sound Realty Sales, Inc.
Broken Sound Realty Sales, L.P.
Broward Farms, Inc.
Center Hotel Limited Partnership
Center Office Partners
Center Retail Partners
Coto De Caza, Ltd., Sub-Corporation
Cullasaja JV Sub-Corporation
Cullasaja JV Sub-Partnership
Cullasaja Realty, Inc.
Cullasaja Realty, L.P.
Eagle Watch Golf, Inc.
Eagle Watch Partners
Eagle Watch Realty, Inc.
Eagle Watch Realty Limited Partnership
EW Golf Club, Inc.
EW Golf Club, L.P.
Gulf and Pacific Communications Limited Partnership
Heathrow Cable Limited Partnership
Heathrow Development Associates, LTD.

THE PARTIES AND RULE 29.1 LIST – Continued

Heathrow Golf and Country Club Limited Partnership
Heathrow Property Management Limited Partnership
Heathrow Realty Limited Partnership
J/A Development Partners
JMB Holdings Corporation
JMB Investor Services Corporation
JMB/PCH Corporation
JMB/Realty Corporation
Longboat Key Club Realty, L.P.
Longboat Key Club Realty, Inc.
Merrill Lynch Affiliate
North Creek Utilities, Inc.
Pacific Properties, Inc.
Palm Beach Polo Realty, Inc.
Palm Beach Polo Realty, L.P.
Paulucci Interests
Planned Communities Corporation
South Pacific Cable, Inc.
South Pacific Cable, L.P.
Southeast Florida Holdings, Inc.
Southridge Lakes Realty, Inc.
Talega Real Estate Company
WHCC, Inc.
Waltham Homes Limited Partnership
Waltham Homes, Inc.
Wesmere Realty, Inc.
Wesmere Realty Sales Limited Partnership
Weston Realty Sales Limited Partnership
Weston Realty Sales, Inc.
Whitman Construction, Inc.
Whitman Construction, L.P.

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ARVIDA REALTY SALES, INC., a Florida Corporation, ARSLP, INC., an Illinois Corporation, and ARVIDA REALTY SALES, LTD., a Delaware Limited Partnership,

Petitioners,

vs.

PATRICIA SEAMAN,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rules 10 through 14, ARVIDA REALTY SALES, INC., ARSLP, INC., and ARVIDA REALTY SALES, LTD. (collectively "Arvida" or "the Company") respectfully petition that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit in *Seaman v. Arvida Realty Sales, Inc. and ARSLP*, 985 F.2d 543 (11th Cir. 1993).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported officially as *Seaman v. Arvida Realty Sales and ARSLP*, 985 F.2d 543 (11th Cir. 1993), and is reprinted in the Appendix ("App. A"). The Eleventh Circuit's unreported decision denying Arvida's petition for rehearing/suggestion for rehearing *en banc*, issued on May 19, 1993, is reprinted in the Appendix ("App. B"). The unreported opinions of the district court for the Middle District of Florida dismissing Seaman's ERISA claim, entering final judgment for Arvida on the ERISA claim, and certifying the case for immediate appeal, entered on February 13, 1991, March 21, 1991, and February 3, 1992, respectively, are reprinted in the Appendix ("App. C, D, and E").

JURISDICTION

i. The court of appeals below had jurisdiction of this case under 28 U.S.C. §1291 and entered its judgment on March 10, 1993.

ii. On May 19, 1993, the circuit court denied Arvida's petition for rehearing/suggestion for rehearing *en banc*.[1]

[1] Under 11th Cir. R. 35-6, a suggestion for rehearing *en banc* is automatically treated as a petition for rehearing before the original panel. F.R.A.P. 40. After Arvida filed its petition/suggestion, the circuit court requested Seaman to respond to the petition/suggestion; the court rescinded its request before Seaman's response was submitted, and thereafter denied the petition/suggestion.

iii. Non-applicable.

iv. This Court's jurisdiction to review the judgment in question is based on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act, Section 510, 29 U.S.C. §1140:

> **Interference With Rights Protected Under Act**
>
> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act.

Internal Revenue Code Section 3508, 26 U.S.C. §3508:

> **Treatment Of Real Estate Agents And Direct Sellers**
>
> (a) General rule. – For purposes of this title, in the case of services performed as a qualified real estate agent or as a direct seller –
>
> (1) the individual performing such services shall not be treated as an employee, and –

(2) the person for whom such services are performed shall not be treated as an employer.

(b) Definitions. – For purposes of this section –

(1) Qualified Real Estate Agent. – The term "qualified real estate agent" means any individual who is a sales person if –

(A) such individual is a licensed real estate agent,

(B) substantially all of the remuneration (whether or not paid in cash) for the services performed by such individual as a real estate agent is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and

(C) the services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the individual will not be treated as an employee with respect to such services for Federal tax purposes.

STATEMENT OF THE CASE

Respondent Patricia Seaman ("Seaman") was one of a group of individuals employed by Arvida in the capacity of real estate sales associate. Prior to April 1989, all real estate sales associates were employed pursuant to written contracts granting Arvida and the employee the right to terminate the employment relationship at will. The employment contract specifically addressed employee benefits and provided that "nothing herein shall obligate [Arvida] . . . to maintain or renew any such benefit . . . ". The benefit plans which are the subject of this lawsuit provided benefits only for "employees" of Arvida.

In April 1989, Arvida made the business decision that, to remain competitive in a depressed real estate market, it must restructure and reduce its workforce. As a part of the restructuring, the entire group of real estate sales associates was converted from employee status to independent contractors.[2]

The conversion from sales employee to sales independent contractor was designed to reduce Company payroll costs. The independent contractors became responsible for their own employment, unemployment, and workers' compensation taxes, real estate registration and licensing fees, and automobile liability insurance.

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[2] This conversion was made pursuant to 26 U.S.C. §3508, "Treatment of real estate agents and direct sellers". This statute provides that for tax purposes, qualified real estate agents will not be considered "employees", thereby authorizing employers and sales agents to avoid the employment relationship for purposes of withholding taxes, reporting obligations and other indicia of employment.

And, the independent contractors did not qualify for participation in the Arvida health plan or the Arvida 401(k) plan for employees.[3]

It is undisputed that the sole criteria governing conversion from employee to independent contractor was sales associate status. Each of the sales associates was offered a continuing relationship with Arvida on a commission basis. Arvida encouraged all real estate personnel, including Seaman, to remain with the Company as independent contractors.

With the sole exception of Seaman, all real estate sales associates continued their relationship with Arvida as independent contractors. Seaman refused such opportunity. She filed suit in federal court alleging that restructure of the sales associate group from employee to independent contractor status resulted in loss of future benefits. Seaman alleged that the Company's reclassification of her to independent contractor status was motivated by its effort to reduce its payroll costs, including reduction of future benefit costs. According to Seaman, this business strategy, which ended her participation in the Company's employee benefit plans, constituted a violation of Section 510 of ERISA, which provides in relevant part:

> It shall be unlawful for any person to discharge . . . a participant or beneficiary for . . . the purpose of interfering with the attainment of

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[3] Subject, of course, to continued health insurance coverage available under COBRA.

> any right to which such participant may become entitled under the plan. . . .

29 U.S.C. §1140.[4]

Seaman never alleged that Arvida's actions were targeted against her individually; she acknowledged that Arvida was, in fact, involved in a reduction in force to reduce payroll costs, which included but was not limited to a reduction in overall cost of benefits. Further, Seaman never claimed to have a contractual right to continue to participate in Arvida's benefit plans. Nor did she claim violation of any plan provisions.

With respect to her 401(k) participation, Seaman never claimed to have lost any non-vested employer contribution made through the date of her termination. To the contrary, she was fully vested in all such contributions. Further, Seaman had no outstanding claim for any Arvida health plan benefit.

Seaman's Section 510 claim was based solely on the fact that Arvida's restructure of its sales force was motivated by its goal of reducing payroll expenses, including reduction of future benefit costs.

The Company moved to dismiss Seaman's ERISA claim on the ground that she had no protectable rights under ERISA Section 510, and the Complaint failed to

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[4] Seaman's complaint included a claim that the manner in which the alleged Section 510 violation was effected created a derivative RICO violation; she also alleged several related state law violations. These claims were not relevant to the Eleventh Circuit appeal and not relevant to this Petition.

state a viable claim. The district court reasoned that Seaman made no claim for vested or accrued benefits protected by ERISA; that ERISA does not confer a general right to continued employment; and that Seaman's ERISA Section 510 claim for non-vested, unaccrued and entirely speculative future benefits failed to state any viable claim under the statute.[5]

A panel of the Eleventh Circuit reversed, holding for the first time that future "entitlement" to prospective, non-vested and unaccrued benefits was protected by the ERISA Section 510 anti-discrimination provision. The court held that, although the Company would have been fully entitled to amend its benefit plans to exclude all real estate sales associates from participation without violating ERISA (or, alternatively, entitled to terminate all plans as to all employees), the conversion to independent contractor status for economic reasons which included reduction of future benefit costs, stated a Section 510 "interference with benefit" claim.

According to the court below, where a workforce is restructured to effect payroll cost savings, including reduction of employee benefit costs, each affected employee has an ERISA Section 510 "discrimination" claim. Economic exigencies requiring such cut-back, no matter how grave, are no defense to the employee's Section 510 claim because, according to the circuit court, employees lost their jobs and that personnel decision was motivated by the employer's need to cut operating

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[5] The district court dismissed Seaman's ERISA claim in its entirety. On Seaman's motion, the case was certified for appeal pursuant to Fed.R.Civ.P. 54(b).

expenses, including future benefit costs. This entirely neutral business decision has been declared illegal by the court below.

Arvida petitions this Court to review the circuit court's decision and establish the proper parameters of Section 510 protection; and to resolve the grave conflict between the decision below and Supreme Court precedents and decisions of sister circuit courts of appeal.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals below conflicts in principle with this Court's decisions in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), and *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), which recognize that ERISA is a "complex" and "carefully reticulated" statute under which courts must not expand relief absent express statutory permission.

Despite this clear mandate, the court below engrafted a new cause of action on ERISA, ruling that under Section 510 an employer may not reduce its workforce if the reduction is designed in part to reduce future employee benefit costs. According to the court below, a reduction in force – even a reduction based entirely upon job classification and entirely unrelated to any employee's individual participation in, or cost to, an employee benefit plan – constitutes a *per se* "interference" with future employee benefits.

The Eleventh Circuit's interpretation of Section 510 is contrary to prior holdings of this Court because it eliminates business justification as a defense to a Section 510 discrimination claim;[6] and it creates *per se* liability when future benefit costs are reduced as a component of a non-discriminatory reduction in force. According to the circuit court, *per se* liability can attach to a reduction in force, despite the fact that ERISA expressly authorizes the employer to eliminate the same benefits from the same group of employees merely by amending its benefit plans.

The Eleventh Circuit has held that plans can be amended to exclude participants and reduce the cost of attendant benefits with no liability under ERISA; however, if the same employer wishes to reclassify or terminate employees to reduce benefit *and* non-benefit payroll costs, then the employer faces *per se* liability under ERISA

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[6] The Eleventh Circuit approach holds that business justification underlying a reduction in force designed to cut back all forms of payroll costs – including benefit costs – is irrelevant to Section 510 "entitlement". According to the lower court's interpretation, if the employer included future benefit costs in its economic strategy and decision-making process, then any and all related force reductions constitute a prohibited "interference" with the employee's right to future benefits. This discard of business justification to rebut a "discrimination" claim is contrary to the principle of this Court's holdings in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 292, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), as confirmed by *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (June 23, 1993), and as applied to ERISA Section 510 claims. *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1222-23 (11th Cir. 1993); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 239 (4th Cir. 1991).

Section 510.[7] Based upon this Court's recognition of the comprehensive ERISA remedial scheme, there is no basis to imply the existence of a Section 510 remedy which so clearly exalts form over substance.

The Bureau of Labor Statistics annually publishes an index showing median wages and payroll costs in the United States. As of March 1993, the average hourly payroll wage was $12.68, while an additional $5.22 was spent on employee benefits. *Daily Labor Report*, 1993 DLR 117 d-21 (BNA) (June 21, 1993). These figures establish that payroll costs are nearly one-third benefit-related.

Since ERISA was enacted in 1974, literally thousands of employers have implemented reductions in force with the objective of reducing operating costs. In each and every case, the terminations of employment were designed in part to eliminate future, non-vested unaccrued benefits and the cost of providing same. The decision below transforms a standard, accepted and legitimate employer practice, often critical to continued operations, into a *per se* illegal act.

The court below misinterpreted ERISA Section 510 to create enforceable rights to non-vested, unaccrued and entirely speculative benefits. The court inferred an ERISA guarantee to continued employment; and created ERISA Section 510 *per se* liability where terminations cut along job classifications, are supported by business justification,

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[7] The lower court opinion indicates that an employer's honesty about economic realities, and its need to reduce its payroll expenses, including future benefit costs, subjects the employer to *per se* Section 510 liability.

and demonstrate no invidious discrimination. This ERISA "wrongful discharge" claim is a mistaken and unwarranted expansion of ERISA remedies in direct violation of this Court's prior rulings.

The Eleventh Circuit's expansion of Section 510 to include a cause of action based solely on speculative future employment is in conflict with the remaining provisions of ERISA and intrudes on fundamental principles of employment at will. The Eleventh Circuit's conflict with this Court's rulings should be resolved so that employers can obtain the certainty and uniformity of law that ERISA was designed to provide.

I. THERE IS A CONFLICT WITH DECISIONS OF THIS COURT.

A. Under This Court's Clear And Repeated Directives, ERISA Remedies Are Strictly Construed; Extra-Statutory Causes Of Action Will Not Be Implied.

In *California v. Sierra Club*, 451 U.S. 287, 297, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981), this Court flatly stated that "the federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide". Judicial restraint has consistently governed this Court's interpretation of the ERISA remedial scheme which was crafted only after "a decade of congressional study of the nation's private employee benefit system". *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980). This Court has refused to imply an action for extra-contractual damages (*Massachusetts Mutual Life Ins.*

Co. v. Russell, 473 U.S. 134, 145, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)); refused to imply an ERISA remedy against third party conspirators in an alleged ERISA fiduciary breach (*Mertens v. Hewitt Associates*, 508 U.S. ___, 124 L.Ed.2d 161 (1993)); and broadly enforced preemption of any state law impacting benefit administration. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987).

In *Mertens*, Justice Scalia confirmed this Court's ERISA approach:

> In *Russell* we emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly".

124 L.Ed.2d at 169. (emphasis in original).

The Court further cautioned:

> The authority of courts to develop a "federal common law" under ERISA, *see Firestone, supra*, at 110, is not the authority to revise the text of the statute.[8]

Id.

Despite this Court's admonitions to avoid expansion of ERISA's carefully crafted remedial scheme, the court below broke new ground when it recognized an ERISA Section 510 wrongful discharge claim based on nothing

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[8] *Firestone* is *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

more than economic termination involving a class of employees; and suggested that any reduction in force designed to lower payroll expenses (including reduction of benefit costs) triggers *per se* Section 510 liability.

The circuit court created new ERISA rights and remedies by holding that Section 510 protects non-vested, unaccrued and entirely speculative future plan enrollment; and by implicitly holding that Section 510 guarantees continued employment because it prohibits an employer from reducing its workforce to obtain economic competitiveness. The error inherent in the Eleventh Circuit's decision is highlighted by the anomalous "form over substance" result. This Court's review, to establish Section 510 parameters and eliminate suggested *per se* liability, is mandated.

1. Congress Did Not Intend To Create Section 510 Wrongful Discharge Liability Where The Same Result Is Fully Authorized By Amendment To An Employee Benefit Plan.

The Eleventh Circuit conceded that its Section 510 analysis "may be anomalous", since:

> The combined effect of our holding today and cases such as *McGann* is an interpretation of ERISA that prohibits employers from discharging employees to avoid paying benefits but permits employers to reduce or terminate non-

> vested benefits simply by changing the terms of a plan.[9]

985 F.2d at 546.

Thus, the court conceded that the substantive portions of ERISA fully authorize Arvida to do just what it did; eliminate benefits in order to reduce payroll costs. The court concluded, however, that because Arvida chose to reduce its workforce based upon job classification, rather than amend or eliminate the plan as to all its employees, a Section 510 liability claim was stated. Under this analysis, each and every employee in the United States who participates in ERISA-governed employee benefits and is laid off as part of a reduction in force to reduce payroll costs, has an implied Section 510 discrimination claim. The circuit court's inference of this extraordinary remedy is egregiously contrary to this Court's interpretation of the ERISA remedial scheme.

In *Pilot Life Ins. Co. v. Dedeaux, supra,* 481 U.S. at 51, this Court cited the maxim of *United States v. Heirs of Boisdore,* 8 How. 113, 122, 12 L.Ed. 1009 (1849), when it interpreted the preemption provisions of ERISA:

> [i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.

Dedeaux, 481 U.S. at 51.

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[9] *McGann* is *McGann v. H & H Music Co.,* 946 F.2d 401 (5th Cir. 1991), *cert. denied sub nom. Greenberg v. H & H Music Co.,* ___ U.S. ___, 113 S.Ct. 482 (1992).

In *Mertens v. Hewitt Associates, supra,* 124 L.Ed.2d at 174, this Court reiterated the "tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs",[10] and cautioned that in enacting ERISA, Congress "resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens,* 124 L.Ed.2d at 174. Indeed, one of the central goals of ERISA was to foster the establishment and maintenance of voluntary employee benefit plans by allowing employers flexibility to adjust for benefit costs. *Moore v. Metropolitan Life Ins. Co.,* 856 F.2d 488, 492 (3d Cir. 1988). Nothing in ERISA supports the notion that Congress intended to permit employers to achieve costs savings only through plan amendment, and impose Section 510 liability when the same cost saving (and the same elimination of benefits) are achieved through traditional employment action.

Section 510 must be interpreted in harmony with the remainder of ERISA to recognize that the economics of benefit costs – almost a third of payroll – play a central and legitimate role in the employer-employee relationship. The substantive portions of ERISA acknowledge that an employer may amend its plans (or terminate them) to eliminate participation of a group of employees and reduce costs. Whether this is done by plan amendment or by employment action (i.e., termination, lay-off,

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[10] The competing ERISA interests involved in providing benefit protection and, at the same time, fostering the continued existence of employer-sponsored programs, were noted by this Court in *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 515, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981).

reclassification of the employee, or transfer to a non-participating job), should be of no moment to ERISA Section 510. Indeed, many times this Court has counseled against elevation of form over substance and "labels over reality". *See, Franchise Tax Board v. Alcan Alum. Ltd.*, 493 U.S. 331, 339, 110 S.Ct. 661, 107 L.Ed.2d 696 (1990); *Bowen v. Gilliard*, 483 U.S. 587, 606, 107 S.Ct. 3008, 97 L.Ed.2d 485 (1987). Yet, form over substance is the only path sanctioned for employers by the court below.[11]

"The purpose of Congress is the ultimate touchstone" controlling statutory interpretation and liabilities. *Retail Clerks v. Schernerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963). This Court's previous ERISA decisions starkly contradict the lower court's conclusion that Congress vested employers with the right to amend (or completely terminate) benefit plans and to cease future benefit accruals, while making it illegal to restructure workforces in order to lower payroll costs and reduce benefits.

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[11] The illogic of the court's "form over substance" holding is apparent from the message it sends. The reclassification of Arvida's sales associates plainly has significant non-ERISA benefit advantages for the employer, such as cessation of FICA and unemployment insurance taxes and workers compensation costs. Thus, even if Arvida had elected to change the terms of its plan to exclude sales associates (and thereby avoid any Section 510 claim), the sales associates would *still* have been reclassified as independent contractors. The plan amendment to exclude this group from plan participation, suggested by the court as the "cure-all", would be rendered completely and utterly meaningless. The attachment of Section 510 liability for failure to obtain an empty and futile plan amendment prior to reclassification, truly extols "form over substance".

An employer should not be held liable under Section 510 whether future benefits are eliminated by plan amendment, or by reductions in force which cut along lines entirely independent of plan participation or claims. The lower court's contrary reasoning and result is in severe conflict with this Court's ERISA holdings. This petition should be granted and a writ should issue to permit this Court's review of the lower court's decision.

2. ERISA Section 510 Does Not Create Substantive Benefit Rights In Addition To Rights Created Under The Plan Or In Other Parts Of ERISA.

In interpreting Section 510, it must be kept in mind that ERISA is first and foremost a benefits statute, not an employment discrimination statute. The sole reason Section 510 appears in the legislative scheme is to keep employers from achieving through employment actions what they cannot legitimately achieve through their benefit plans.

Yet, the Eleventh Circuit has turned this straightforward concept on its head, reading Section 510 to impose employment liability for achieving a result that is entirely legal under the remainder of ERISA. Nothing in the language or legislative history of ERISA supports such interpretation of the Act.

It is critical to differentiate between this case claiming a right to entirely unearned future benefits, and Section 510 cases in which an employer acts to eliminate benefits earned by service *already rendered* by the employee. In the instant case, the court upheld a Section

510 claim based solely on *prospective* employment and attendant prospective benefit plan rights.

By contrast, Section 510 cases normally require allegations that the employer has terminated specific, selected individuals who are close to 100% vested in a plan benefit. *See, e.g., Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987). In such cases, the employer acts not only against selected individuals (as opposed to a class), but unfairly negates years of vesting service which the employee has already rendered on behalf of the employer.

This recognized area of Section 510 protection differs from the instant case in a further critical aspect. In the case of vesting, an employer cannot bar an employee from future service accruals by plan amendment. ERISA regulations require that even if an individual is removed from future plan participation by amending the plan's eligibility criteria, he or she continues to accrue vesting service. DOL Reg. §2530.210, 29 C.F.R. §2530.210. The protections of Section 510 and the substantive provisions of ERISA dovetail exactly: an employer cannot avoid ERISA's substantive vesting requirements by plan amendment *or* by employment action.

By contrast, when dealing with future plan participation, the court below has created an improper distinction between the substantive portions of ERISA (future plan participation can be eliminated by plan amendment), and Section 510 (future plan participation cannot be eliminated through an employment action).

The provisions of ERISA should be read uniformly and to avoid the "form over substance" result reached by

the court below. Section 510 refers expressly to benefit "rights" created under the *remainder* of ERISA and in plan documents, not to new, substantive rights created solely by Section 510. This Court should grant certiorari to review the proper scope of relief available under Section 510.

B. The Lower Court Decision Conflicts With *McDonnell-Douglas, Burdine,* And *Hicks,* As Applied To ERISA Section 510; And Creates *Per Se* Liability Regardless Of Business Justification.

The allocation of burden and order of proofs in the federal discrimination context has been well settled by this Court's Title VII analysis. *St. Mary's Honor Center v. Hicks,* ___ U.S. ___, 61 U.S.L.W. 4782 (June 25, 1993); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Federal courts have held unanimously that the ERISA Section 510 anti-discrimination provision is essentially parallel to Title VII prohibitions; and that the Title VII allocation of proof controls the ERISA Section 510 liability analysis. *Clark v. Coats & Clark, Inc.,* 990 F.2d 1217, 1222-23 (11th Cir. 1993); *Conkwright v. Westinghouse Elec. Corp.,* 933 F.2d 231, 239 (4th Cir. 1991) ("the *McDonnell-Douglas* scheme of presumptions and shifting burdens of proof is appropriate in the context of discriminatory discharge claims brought under §510 of ERISA"); *Hendricks v. Edgewater Steel Co.,* 898 F.2d 385, 389 (3d Cir. 1990) (same); *Gavalik v. Continental Can Co.,* 812 F.2d 834, 852 (3d Cir.

1987) (same); *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988) (same).

In *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 61 U.S.L.W. 4782 (June 25, 1993), this Court confirmed that *prima facie* allegations of discrimination are rebutted where the alleged "discriminatory" employment action is supported by legitimate business justifications. Where business justification is articulated, any presumption grounded on a plaintiff's status within a suspect class and negative employment action, drops from the case. *Id.*, 61 U.S.L.W. at 4783; *see Burdine, supra*, 450 U.S. at 255.

Circuit courts applying *McDonnell-Douglas* to statutory employment discrimination claims have repeatedly recognized that employment actions (including reductions in force) taken to reduce payroll costs in a neutral manner, constitute legitimate business practices, fully sufficient to refute statutory discrimination claims. *Early v. Champion Intern. Corp.*, 907 F.2d 1077 (11th Cir. 1990) (even if threshold *prima facie* case was established, plaintiffs were discharged for legitimate nondiscriminatory reasons associated with a company-wide reduction in force); *Hendricks v. Edgewater Steel Co.*, 898 F.2d 385 (3d Cir. 1990) (company decision to lay off employees and thereby avoid further benefit accrual does not constitute an ERISA Section 510 violation); *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988)[12]; *Barnes v.*

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[12] "The district court found Continental's asserted reason for terminating Dister legitimate and nondiscriminatory: the termination resulted from a corporate reorganization and a concomitant change in business priorities directed toward revising the employer's product development goals and cutting

Southwest Forest Ind., 814 F.2d 607 (11th Cir. 1987) (decision to close down department and utilize independent contractors prompted by valid economic considerations); *Daniels v. Westinghouse Elec. Corp.*, 772 F.Supp. 1278, 1282 (N.D.Ga. 1990), *aff'd*, 944 F.2d 828 (11th Cir. 1991) (per curiam) (reduction in force based upon job classification, unprofitable performance of work group, and reduction of payroll costs, are legitimate business objectives which refute alleged discriminatory termination).

In the instant case, Seaman admits in her Complaint that the same type of payroll economics triggered her discharge. This compelling fact was disregarded by the circuit court in finding a viable Section 510 claim. According to the court below, where a class of employees are eliminated from employment based on neutral job classification, and thereby eliminated from employee benefit plans, economic or other business justification is no defense to an ERISA Section 510 claim. According to the circuit court, if job elimination is motivated even in part by the employer's need to reduce benefit costs, an ERISA Section 510 claim is triggered. The lower court's analysis improperly destroys the business justification defense to a Section 510 claim.

The court suggests that the *per se* liability situation is solved because the employer may avoid Section 510 by "reduc[ing] or terminat[ing] non-vested benefits simply by changing the terms of the plan". *Seaman*, 985 F.2d at 546. The lower court never addresses the fact that it has

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overhead. The record before us amply supports this assertion. Continental therefore met its burden of articulating a legitimate reason for plaintiff's discharge." *Id.* at 1115.

created an ERISA right to continued employment because the employer cannot terminate employees to reduce benefit expense. Rather, according to the court below, the employer must continue employment; amend the plan to reduce or eliminate employee benefit participation; and only then effect its reduction in force in order to satisfy its business needs to reduce payroll expenses.

The lower court paid lip service to the Section 510 required "show[ing] that the employer had the specific intent to interfere with the employee's right to benefits". *Id.* Such employee "burden" has little substantive meaning since the decision indicates that an "intent to interfere with an employee's right to benefits" can be satisfied by allegations that payroll reductions motivated the employer, and reduction of benefits were a part of the over-all program.

The lower court's *per se* liability analysis is in conflict with sister circuit Section 510 analyses. In *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991) *cert. denied, sub nom. Greenberg v. H & H Music Co.*, ___ U.S. ___, 113 S.Ct. 482 (1992), the Fifth Circuit refused to hold that ERISA Section 510 prohibits an employer from reducing benefits as between groups of employees. Citing this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), *McGann* held that a reduction of welfare benefits, applied to an identifiable class of employees with the goal of reducing employer health care costs, does not support a Section 510 claim. *Id.* at 407-08. The Fifth Circuit reiterated the employer's right to flexibility in determining plan participation and benefit status. Section 510 does not hamstring the employer

from taking neutral, business justified action to economize its payroll, including benefit costs.[13]

Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir. 1987), is no support for the lower court's conclusion that a non-discriminatory reduction in force with an intent to cut benefit costs is sufficient to state a Section 510 claim. The *Gavalik* Section 510 issue did not involve a neutral reduction in force based only upon job class; rather the complaint alleged that individual employees were selected for lay-off based upon their proximity to pension vesting and/or other employee benefit expense. The *Gavalik* analysis has no application to the instant Complaint in which Seaman admits that the reduction in force and concomitant benefit loss was part of a program to reduce payroll costs which effected the entire class of sales associates without regard to individual benefit entitlements or costs. Here, Plaintiff has never alleged that termination involved any invidiously discriminatory intent.

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[13] In *McGann*, the Fifth Circuit held that an employer cannot be liable under ERISA Section 510 for reducing health coverages for AIDS despite the fact that an employee, while covered by the plan, contracted the illness and filed benefit claims for the disease. Here, the lower court takes a contrary approach, ruling that the federal court can and must prevent an employer from reducing health coverage to an identified class of employees once such employees have qualified as plan participants. Here, the lower court's interpretation creates Section 510 liability each time a reduction in force reduces future employer costs in funding benefit plans. Under this expansive Section 510 approach, "the boundaries of judicial involvement in the creation, alteration and/or termination of ERISA plans would be sorely tested." *McGann*, 946 F.2d at 408.

In *Aronson v. Servus Rubber, Div. of Chromalloy*, 730 F.2d 12 (1st Cir., 1984), *cert. denied*, 469 U.S. 1017 (1984), the employer terminated a welfare plan with respect to a discrete group of its workforce. The termination cut along independently established lines (i.e., the division to which the affected employees were assigned) and was supported by apparent business justifications. The employee group sued, claiming that termination of their benefits constituted illegal "interference" under ERISA Section 510. Contrary to the reasoning below, *Aronson* refused to allow any Section 510 claim. No facts established any invidious discriminatory intent. A benefit restructure which turned on benefit-neutral job classifications would not support ERISA Section 510 liability:

> [Section 510] relates to discriminatory conduct directed against individuals, not to actions involving the plan in general. The problem is with the word 'discriminate'. . . . A partial termination cannot constitute discrimination *per se*. A termination that cuts along independently established lines – here separate divisions – and that has a readily apparent business justification, demonstrates no invidious intent.

Id. at 16.

Here, based on Seaman's own allegations, the conversion to independent contractor and loss of various employment perquisites including benefit plan participation, was based entirely upon job classification; there was no allegation of invidious discrimination. The Company's business justification (across-the-board payroll cost reductions involving removal of all sales associates from employee status) was admitted. By refusing to consider

business justification,[14] and/or the admittedly neutral selection process, the circuit court ignored this Court's settled employment discrimination analysis in favor of an implied *per se* Section 510 claim. This Court's review is needed to confirm the limits of Section 510 within the comprehensive ERISA regulatory scheme.

II. THERE IS A CONFLICT WITHIN THE CIRCUITS.

The Circuit Court Has Created A "Quasi-Vesting" Of Welfare Plan Benefits Which Prohibits An Employer From Re-Structuring Its Workforce To Remain Competitive.

Employee welfare plan benefits are non-vested and non-accrued. 29 U.S.C. §§1002(1), 1051(1); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732, 105 S.Ct. 2380, 85 L.Ed.2d 728, 735 (1985); *Owens v. Storehouse, Inc.*, 984 F.2d 394, 397-98 (11th Cir. 1993); *McGann v. H & H Music Co.*, 946 F.2d 401, 405 (5th Cir. 1991), *cert. denied sub nom. Greenberg v. H & H Music Co.*, ___ U.S. ___, 113 S.Ct. 482 (1992). Congress specifically considered and rejected vesting of health and welfare entitlements; the inevitably increasing expense would create a significant disincentive for employers to provide such benefits. *Owens v. Storehouse, Inc.*, 984 F.2d at 398 & n.5. A linchpin of ERISA welfare benefits regulation is flexibility, reserved to the

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[14] Not only did the circuit court ignore business justification as an available defense, it actually inverted the Company's proffered business justification into *prima facie* proof of discriminatory intent.

employer, to respond to changing technologies and market conditions.[15]

The circuit court's decision does violence to these precepts. While paying lip service to the employer's "right to modify the benefits they offer", the circuit court has created a quasi-vesting of entirely prospective benefits based on the proposition that the employee cannot be terminated to reduce payroll costs because such termination interferes with future benefit possibilities. However, if the employer goes through the exercise of amending the plan to eliminate the subject employees from plan participation prior to termination, then it can proceed with force reduction free from Section 510 liability. The circuit court's approach, which necessitates a maze of useless administrative paperwork and expense, is conspicuously contrary to Congress' express intent to foster the continued existence of employee benefit plans. 29 U.S.C. §1001.

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[15] Both the express language of ERISA and the law interpreting it make clear that ERISA does not require or even contemplate vesting of health insurance benefits. 29 U.S.C. §§1051, 1081(a); *Shaw v. Delta Air Lines, supra*, 463 U.S. at 91; *Metropolitan Life Ins. Co. v. Massachusetts, supra*, 471 U.S. at 732. Congress intentionally declined to require vesting of welfare benefits based upon the employer's need for flexibility because, among other reasons, the costs of providing benefits are constantly impacted by unpredictable variables. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (3d Cir. 1988) ("[M]edical insurance must take account of inflation, and increases in costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs"). Congress "left the employer with considerable flexibility with respect to welfare plans". *Reichelt v. Emhart Corp.*, 921 F.2d 425, 429 (2d Cir. 1990).

The circuit court's insistence that its decision does not impede the rights of employers is illusory. Nothing in ERISA suggests that a sponsoring employer can respond to payroll cost pressures and market realities only if it first jumps through the hoops of amending all of its employee benefit plans (including notices, amendments to summary plan descriptions, and myriad other administrative requirements). Under the aegis of ERISA Section 510, the circuit court has improvidently utilized a benefits statute to regulate employment practices and, without benefit of a business justification defense, dictates how employers can and cannot compete. This approach has nothing to do with ERISA benefit regulation and undermines employer flexibility that is a touchstone of the Act.

The circuit court's "quasi-vesting" of future welfare benefits is contrary to the plain language of ERISA, its legislative history, Supreme Court directives and sister circuit analyses. Certiorari is required to confirm employer flexibility to manage its workforce in a benefit neutral manner without imposition of *per se* Section 510 liability; and, to reaffirm the contingent non-vested nature of welfare benefits.

CONCLUSION

For all the reasons stated above, Arvida respectfully urges the Court to issue the writ and resolve the demonstrated conflict.

Respectfully submitted,

WILLIAM F. KASPERS
FISHER & PHILLIPS
1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, Georgia 30326
(404) 231-1400

Counsel of Record for Petitioner

APPENDICES

Appendix A: *Patricia Seaman v. Arvida Realty Sales and ARSLP,* 985 F.2d 543 (11th Cir. 1993).....A1

Appendix B: *Patricia Seaman v. Arvida Realty Sales and ARSLP,* No. 92-2171 (11th Cir. May 19, 1993) (order denying petition for rehearing and suggestion for rehearing en banc) A11

Appendix C: *Patricia Seaman v. Arvida Realty Sales, Inc., et al.,* No. 89-999-CIV-T-17 (M.D.Fla., Feb. 13, 1991) A13

Appendix D: *Patricia Seaman v. Arvida Realty Sales, Inc., et al.,* No. 89-999-CIV-T-17C (M.D.Fla., Mar. 21, 1991) A18

Appendix E: *Patricia Seaman v. Arvida Realty Sales, Inc., et al.,* No. 89-999-CIV-T-17 (M.D.Fla., Feb. 3, 1992) A20

APPENDIX A

Patricia SEAMAN, Plaintiff-Appellant,

v.

ARVIDA REALTY SALES and ARSLP, Defendants-Appellees.

No. 92-2171.

United States Court of Appeals,
Eleventh Circuit

March 10, 1993.

Terminated real estate salesperson sued her former employer, alleging that she was terminated because she refused to accept change in status from employee to independent contractor and concomitant loss of non-vested health insurance coverage in violation of Employee Retirement Income Security Act (ERISA) section prohibiting discharge of participant for exercising any right to which he is entitled under plan or for purpose of interfering with attainment of any right under plan. The United States District Court for the Middle District of Florida, No. 89-999-CIV-T-17C, Elizabeth A. Kovachevich, J., dismissed action. Salesperson appealed. The Court of Appeals, Godbold, Senior Circuit Judge, held that salesperson's termination was actionable under ERISA.

Reversed and remanded.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH, Circuit Judge, GODBOLD and OAKES*, Senior Circuit Judges.

GODBOLD, Senior Circuit Judge:

Plaintiff Patricia Seaman sued her former employer, Arvida Realty Sales, Inc., alleging that she was employed as a real estate salesperson and pursuant to her employment contract was entitled to health insurance coverage and participation in a 401(k) pension plan[1] to which she and Arvida contributed. She alleged that she was notified that she and other salespersons would be terminated in order that Arvida could eliminate the cost of providing the health insurance coverage and the employer's contributions to the 401(k) plan, although the health insurance and 401(k) plans were continued in effect. She stated that she and other terminated employees were offered contracts as independent contractors, which did not provide for health insurance or 401(k) participation. She refused to sign the new contracts and was terminated. Arvida acknowledges that Seaman was terminated because she refused to accept the change in status from employee to independent contractor and the concomitant changes in benefits.

Seaman charged that Arvida's conduct violated ERISA, 29 U.S.C. §§ 1001-1461, and RICO, 18 U.S.C.

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*Honorable James L. Oakes, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.

[1] A 401(k) plan permits employees to defer income to a retirement plan and requires their employer to make contributions in matching amounts. The employees may also be permitted to make additional contributions. *See, e.g., Gluck v. Unisys Corp.*, 960 F.2d 1168, 1173 (3d Cir.1992).

§§ 1961-1968, and asserted state law claims as well. The district court agreed with Arvida that Seaman's entitlement to health insurance and to future participation in the pension plan were not vested or accrued benefits, therefore elimination of these benefits was not prohibited by ERISA. The court, therefore, dismissed the ERISA claim on the ground that plaintiff's termination did not affect § 510 of ERISA.

The case was certified for appeal under F.R.Civ.P. 54(b). The parties do not dispute that before her termination Seaman was an employee entitled to participate in Arvida's benefits plan,[2] or that the health insurance and 401(k) plan are included in the phrase, "employee benefit plan," and thus are covered by ERISA. All agree that the health insurance coverage was not vested, nor was future participation in the 401(k) plan although contributions already made under that plan were vested. Section 510 of ERISA provides:

> It shall be unlawful for any person to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provision of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

29 U.S.C. § 1140 (1988).

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[2] Seaman's employment contract provided that she was entitled to:

> such benefits, health insurance and/or life insurance, as may from time to time be provided by Broker for and to its employees; provided that, nothing herein shall obligate Broker to obtain, maintain, or renew any such benefit, health insurance and/or life insurance.

Arvida relies on *Phillips v. Amoco Oil Co.*, 614 F.Supp. 694 (N.D.Ala.1985), *aff'd* 799 F.2d 1464 (11th Cir.1986), *cert. denied* 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987), as authority that § 510 does not extend to contingent non-vested benefits.[3] The court of appeals decision in *Phillips* states: "as we noted above, the employer may terminate previously offered contingent non-vested benefits." 799 F.2d at 1471. That statement does not, however, establish that § 510 is never applicable to non-vested benefits. *Phillips* involved a concern that was sold for reasons independent of terminating employee benefits and terminated its pension plan. Amoco sold its propane gas business not for the purpose of interfering with ERISA rights but rather because of legitimate business concerns that stemmed from regulations that limited the price that it could charge for liquid propane. 614 F.Supp. at 722-23. Some employees were terminated in the transaction, but this was "an incidental result of a legitimate business transaction which ERISA was not designed to regulate or prohibit." *Id.* The district court noted that the purpose of § 510 is to "prohibit . . . adverse treatment of a

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[3] Arvida also contends Seaman has not shown that she was deprived of or prevented from obtaining any plan benefit. This contention is refuted by the record. Seaman alleged that, as an employee, she was entitled to participate in Arvida's health benefits and 401(k) plans, and that her termination deprived her of those benefits. Complaint ¶¶ 7-10. Because the district court dismissed her claim, we must accept Seaman's allegations as true. Moreover, Arvida has conceded that, while an employee, Seaman was entitled to participate in its health benefits and 401(k) plans, and that the plans continued to be in effect after her termination.

particular employee which amounts to or threatens 'constructive discharge,' and which is carried out for the purpose of interfering with the employee's attainment of future benefits or punishing the employee for the exercise of protected rights." *Id.* at 721.

Other cases affirmatively state that an employer may not discharge employees to prevent them from taking advantage of benefits even if those benefits are not yet vested. *Conkwright v. Westinghouse Elec. Corp.* 933 F.2d 231, 237 (4th Cir.1991); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir.1989), *cert. denied*, ___ U.S. ___, *111 S.Ct.53, 112 L.Ed.2d 28 (1990); Clark v. Resistoflex Co.*, 854 F.2d 762, 770 (5th Cir. 1988); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1242-43 (7th Cir.1983); *West v. Butler*, 621 F.2d 240, 245 (6th Cir.1980).

We agree with the reasoning of the Fourth Circuit in *Conkwright* which held that Congress did not intend to leave employees unprotected once their rights were vested and that § 510 prohibits the employer from discharging an employee for the purpose of preventing the employee from receiving additional vested benefits. 933 F.2d at 238. The Fourth Circuit's conclusion is consistent with § 510's language, which protects "the attainment of any right to which such participant may become entitled." One may not conclude that as a matter of law employers will not fire employees to prevent the employees from obtaining future benefits; rather, whether an employer intends to interfere with the employee's right to future benefits is a factual inquiry to be answered on a case-by-case basis. The validity of a § 510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge. A plaintiff must

show that the employer had the specific intent to interfere with the employee's right to benefits. *Id; Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir.) (en banc), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987). This standard does not require the plaintiff to show that interference with ERISA rights was the sole reason for discharge but does require plaintiff to show more than the incidental loss of benefits as a result of a discharge. *Gavalik*, 812 F.2d at 851. Seaman alleged that Arvida terminated her because she would not give up the right to continued participation in the health plan and for the specific purpose of interfering with her rights under ERISA.[4]

The caselaw we have set out defuses Arvida's argument that § 510 protection will turn every discharge into a § 510 violation. Arvida cites numerous cases but none stands for the proposition that an employer may discharge employees for the purpose of removing them from a non-vested benefits plan. Instead, these cases concern an employer's right to terminate or amend a benefits plan. *See, e.g., McGann v. H & H Music Co.*, 946 F.2d 401, 407-08 (5th Cir.1991), *cert. denied*, ___ U.S. ___, 113 S.Ct.

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[4] In her appeal Seaman contends for the first time that, in addition to violating ERISA, her termination violated the terms of Arvida's benefits plan. This court generally will not consider legal issues or theories raised for the first time on appeal. *Latimore v. Oman Constr.*, 868 F.2d 437, 439 (11th Cir.1989), but has discretion to do so if the issue raises a pure question of law and refusal to consider it would result in a miscarriage of justice, *id.* Because we conclude that her termination is actionable under § 510 of ERISA, we do not consider her contention that the terms of Arvida's benefits plan were also violated.

482, 121 L.Ed.2d 387 (1992) (holding that an employer may amend plan's coverage of catastrophic illness after employee had contracted AIDS); *Blessitt v. Retirement Plan for Employees of Dixie Eng. Co.*, 848 F.2d 1164, 1179 (11th Cir.1988) (en banc) (discussing distribution of plan assets upon termination of pension plan). *McGann* specifically distinguished cases holding that an employer may not terminate an employee to avoid paying offered benefits from the principle that an employer retains the right to amend the plan itself. *McGann*, 946 F.2d at 405 n. 7. Our holding that an employer may not terminate an employee for the purpose of avoiding payment of plan benefits should not be interpreted to restrict the employer's right to modify a plan.[5]

The combined effect of our holding today and cases such as *McGann* is an interpretation of ERISA that prohibits employers from discharging employees to avoid paying benefits but permits employers to reduce or terminate non-vested benefits simply by changing the terms of a plan. This result may appear anomalous, but an examination of ERISA and its legislative history reveals that it is the result intended by Congress. ERISA's legislative history recognizes employers' need for flexibility in the design of benefits plans. H.R.Rep. No. 533, 93d Cong., 2d Sess. (1974), *reprinted in* U.S.C.C.A.N. 4639, 4647. ERISA

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[5] Likewise, our holding is consistent with this court's recent decision in *Owens v. Storehouse, Inc.*, 984 F.2d 394 (11th Cir. 1933), which held, like *McGann*, that § 510 of ERISA does not prohibit an employer from terminating previously offered benefits that are neither vested nor accrued. *Id.* at 400.

therefore does not require employers to provide a retirement plan at all, H.R. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* U.S.C.C.A.N. 4670, 4677, or, when an employer chooses to provide benefits, regulate the substantive content of welfare-benefit plans, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732, 105 S.Ct. 2380, 2385, 85 L.Ed.2d 728 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983). On the other hand, ERISA provides that any participant or beneficiary may bring an action "to recover benefits due to him under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). This indicates that, once an employer decides to offer benefits, Congress intended for the employer to be bound by the terms of its plan. These two policies have led one court to declare that "there is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be." *Musto v. American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989).

Section 510 should therefore be interpreted both to protect employees' right to receive benefits according to the terms of the applicable plan and employers' right to modify the benefits they offer. By making it illegal for any person to "discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan," § 510 prohibits employers from preventing an employee from taking advantage of a plan or from applying a plan in a discriminatory manner. *See West*, 621 F.2d at 245. It should not, however, be interpreted to prohibit an employer from

changing the terms of a plan, even if the change affects some employees more than others. *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir.1990); *Aronson v. Servus Rubber, Div. of Chromalloy*, 730 F.2d 12, 16 (1st Cir.), *cert. denied*, 469 U.S. 1017, 105 S.Ct. 431, 83 L.Ed.2d 357 (1984). To do so would effectively prevent employers from reacting to changed circumstances and would reduce the flexibility that Congress sought to protect.

If the employer decides to offer benefits, it must allow its employees to take advantage of the plan and must administer the plan in a nondiscriminatory fashion. But the employer can make the initial decision whether to offer any benefits and may even modify or terminate non-vested benefits at any time. Nevertheless, if Seaman's allegations are true Arvida has violated § 510. Arvida did not change the terms of its plan; rather, it threatened to terminate its salespeople unless they agreed to become independent contractors, performing the same job but ineligible to receive the benefits previously offered to them as employees and still offered to Arvida's remaining employees. It terminated plaintiff for declining to work without the benefits she previously enjoyed though offered to remaining employees. Plaintiff was, in the exact language of § 510, discharged "for exercising [a] right to which [she was] entitled under the provisions of an employee benefit plan." To excuse this action would prevent § 510 from fulfilling its congressionally intended purpose. That Arvida, by changing the terms of its plan, lawfully could have deprived its salespeople of these benefits does not allow it to offer benefits but prevent its salespeople from taking advantage of those benefits on pain of discharge.

Arvida also contends that 26 U.S.C. § 3508, which permits it to employ real estate brokers as independent contractors for tax purposes, authorizes it to terminate salespersons who are currently employees receiving benefits so that it can reclassify them as independent contractors without benefits. There is no indication in § 3508 that Congress intended to suspend the provisions of ERISA in order that employers like Arvida can "reclassify" their employees through termination in order to save the cost of benefits.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2171

PATRICIA SEAMAN,

Plaintiff-Appellant,

versus

ARVIDA REALTY SALES and ARSLP,
Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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(Filed May 19, 1993)

ON PETITION(S) FOR REHEARING AND SUGGESTIONS(S) OF REHEARING EN BANC

Before: KRAVITCH, Circuit Judge, GODBOLD and OAKES*, Senior Circuit Judges.

PER CURIAM:

[X] The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

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*Honorable James L. Oakes, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

[ ] The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

[ ] A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PATRICIA SEAMAN,

Plaintiff,

vs.

CASE NO.
89-999-CIV-T-17

ARVIDA REALTY SALES, INC., etc., et al.,

Defendants.
_____/

ORDER

This cause is before the Court on Defendants' motion to dismiss, and Plaintiff's response.

I. ERISA

In this case, Plaintiff contends she was fired because she refused to become an independent contractor rather than continue as an employee. In her complaint, Plaintiff alleges shortly before May 1, 1989, Plaintiff was notified that she, and all of the other sales employees of Defendants in the Sarasota area, would be terminated. Plaintiff further alleges that the stated reason for termination was to eliminate the costs of providing health insurance and FICA, and eliminate participation in a 401(k) plan. Terminated employees were offered contracts as independent contractors without the benefits previously available. All other terms and conditions of employment remained the

same. Defendant Arvida pays for health insurance for its employees, but not for independent contractors.

ERISA divides employee benefits covered by the Act into two categories: (1) pension benefits (. . . "retirement benefits") and (2) all other benefits (including medical and disability). 29 U.S.C. § 1002(1)-(2). ERISA requires that employer plans providing both categories of benefits be established and maintained in writing, 29 U.S.C. § 1102(a), and that the rights conferred by the terms of such written plans are enforceable by the participants as a matter of federal law. 29 U.S.C. § 1132.

Plaintiff's claim of wrongful deprivation of employee benefits under ERISA involves a two-pronged inquiry: (1) Is the action or conduct complained of contrary to the terms of the plan itself? (2) Are the terms of the plan or the conduct complained of independently violative of ERISA's substantive requirements? *Phillips v. Amoco Oil Co.*, 614 F.Supp. 694 (D.C.Ala. 1985).

A. Terms of Employee Welfare Benefit Plan and 401(k) Plan

The subject plans have not been provided to the Court, and the Court can make no finding as to that prong of the inquiry. Plaintiff does not allege that the conduct complained of offends the terms of the plans.

B. ERISA's Substantive Requirements

Plaintiff contends that the conduct complained of violates ERISA's substantive requirements. The applicable provisions of ERISA state:

> [ERISA's participation and vesting provisions] shall apply to any employee benefit plan- . . . other than . . . an employee welfare benefit plan.

29 U.S.C. § 1051(1).

> [ERISA's coverage provisions] shall apply to any employee pension benefit plan . . . other than . . . an employee welfare benefit plan.

29 U.S.C. § 1081(1).

The employment contract entered into by the parties on April 29, 1987 provides:

> 5. Sales Representative shall, for and during the term of this Agreement, be entitled to participate in such benefits, health insurance and/or life insurance, as may from time to time be provided by Broker for and to its employees; provided that, nothing herein shall obligate Broker to obtain, maintain, or renew any such benefit, health insurance and/or life insurance. Broker shall withhold Income Tax and Social Security from all compensation due Sales Representative hereunder. Broker agrees to pay Sales Representative's membership dues in the Sarasota Board of Realtors, and to pay such other expenses of Sales Representative related to Sales Representative's employment hereunder which are, prior to expenditure, approved in writing by a duly authorized officer of Broker.

The agreement further provides:

> 8. This Agreement may be terminated by either party upon twenty-four hours prior written notice delivered by the party terminating this Agreement to the other party.

Defendants contend that Plaintiff has no right to continued participation in the subject plans, and ERISA authorizes employer termination of health plans and amendment of participation requirements.

The Court agrees with Defendant that entitlement to health insurance and to future participation in a 401(k) plan are not vested or accrued benefits, and Defendants' termination of Plaintiff does not offend any provision of ERISA. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986) (Elimination of benefits neither vested nor accrued not prohibited). There is no dispute that, as to prior contributions to the 401(k) plan, Plaintiff is fully vested in all personal and employer contributions to her account. Plaintiff was terminated prior to the time that any benefit was available to her under the health plan, as well as any future benefit under the 401(k) plan. Plaintiff was not singled out for termination because she attempted to invoke the benefits of the plans. All the sales employees were terminated, and were offered an opportunity for re-employment as an independent contractor without the benefits previously offered.

ERISA does not confer a general right to continued employment in order to become eligible for benefits:

> . . . Neither Congress nor the courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation.

Moore v. Reynolds Metals Co. Retirement Program, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d 780 (1985). As a matter of law, the Court grants the motion to dismiss as to any claim under ERISA.

II. RICO

The Court has examined the allegations of the complaint which are directed to RICO. The Court finds that Plaintiff has not alleged predicate acts which constitute a pattern of racketeering activity. The Court grants the motion to dismiss as to this Count. Plaintiff may amend the complaint within twenty days.

The Court will address the state law claims only if an amended complaint is filed. Accordingly, it is

ORDERED that Defendants' motion to dismiss is **granted** as to Count I. It is further

ORDERED that Defendant's motion to dismiss is **granted** as to Count II, and Plaintiff may file an amended complaint within twenty days of the date of this Order.

DONE and ORDERED in Chambers, in Tampa, Florida on this 13th day of February, 1991.

/s/ Elizabeth A. Kovachevich
ELIZABETH A.
KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PATRICIA SEAMAN,

Plaintiff,

vs. CASE NO. 89-999-CIV-T-17C

ARVIDA REALTY SALES, INC., et al.,

Defendants.

ORDER

This cause is before the Court on Plaintiff's motion for reconsideration, motion for certification pursuant to 28 U.S.C. § 1292(b), and motion for stay of further proceedings pending appeal.

After consideration, the Court denies the motion for reconsideration. As to Count I, the decision of the Court is final, and the Clerk is directed to enter final judgment as to Count I. The Court grants the request for certification pursuant to 28 U.S.C. § 1292(b), finding that Count I involves a controlling question of law as to which there is substantial ground for difference of opinion. Accordingly, it is

ORDERED that the motion for reconsideration is **denied**. It is further

ORDERED that the motion for certification for immediate appeal is **granted**. These proceedings are **stayed** until the appeal is concluded.

DONE and ORDERED in Chambers, in Tampa, Florida on this 21st day of March, 1991.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:

All parties and counsel of record

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PATRICIA SEAMAN,

Plaintiff,

vs. CASE NO. 89-999-CIV-T-17

ARVIDA REALTY SALES, INC., et al.,

Defendants.

_____/

ORDER
(Filed Feb. 4, 1992)

This cause is before the Court on Plaintiff's Motion for Rule 54(b) certification, and response. The Court reconsiders its prior orders, and expressly certifies that there is no just reason for delay in the entry of judgment, and directs the Clerk of Court to enter an amended final judgment.

DONE and ORDERED in Chambers, in Tampa, Florida on this 3rd day of February, 1992.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

Supreme Court, U.S.
FILED
SEP 20 1993
OFFICE OF THE CLERK

No. 93-261

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ARVIDA REALTY SALES, INC., a Florida Corporation, ARSLP, INC., an Illinois Corporation, and ARVIDA REALTY SALES, LTD., a Delaware Limited Partnership,
Petitioners,

v.

PATRICIA SEAMAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

FRANK E. HAMILTON, JR.
(Counsel of Record)
FRANK E. HAMILTON, III
FRANK HAMILTON & ASSOCIATES, P.A.
2620 West Kennedy Boulevard
Tampa, Florida 33609
(813) 879-9842
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

27 pp

QUESTION PRESENTED

As explained *infra,* pp. 5-8, none of the "Questions Presented" as stated at pp. i-ii of the Petition is presented. The only question that *could* be presented—and Petitioner has chosen not to directly present it—is the following:

> Did the Court of Appeals err in the reversal of the District Court, holding that the Complaint stated a claim for relief under Section 510 of ERISA, 29 U.S.C. § 1140, where the Complaint alleged that the Plaintiff was terminated, that the stated reason for her termination was to eliminate the cost of providing health insurance coverage and continued participation in the employer's 401(k) Plans, and that she was terminated, along with other similarly situated employees, in order to deprive them of benefits to which they might become entitled under the employer's employee welfare benefit plans, in violation of ERISA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-261

ARVIDA REALTY SALES, INC., a Florida Corporation, ARSLP, INC., an Illinois Corporation, and ARVIDA REALTY SALES, LTD., a Delaware Limited Partnership,
Petitioners,

v.

PATRICIA SEAMAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent, Patricia Seaman ("Seaman"), was one of a group of individuals employed by Arvida in the capacity of real estate sales associate pursuant to written employment contracts. Each of these employment contracts specifically designated the sales associate as an "employee" and acknowledged Arvida's obligation to make Social Security contributions, pay income tax withholding, etc.

Effective May 1, 1989, Arvida terminated its sales associates, and immediately offered to re-employ them as "independent contractors" pursuant to separate written agreements which specifically identified them as independent contractors, rather than employees. Seaman and

the other sales associates were told that they would no longer be entitled to participate in the employer's health insurance and Section 401(k) Plans.

> Seaman filed suit in the District Court, alleging that 5. . . . The stated reason for the termination was in order to eliminate the cost of providing health insurance coverage to the sales employees (and employer 401(k) and FICA contributions), . . .

and that until her termination Plaintiff was a participant in the employee health insurance programs, which were employee welfare benefit plans within the meaning of ERISA, that she was a participant in the 401(k) Plan, which was also an employee welfare benefit plan within the meaning of ERISA, and that

> 9. Plaintiff and the other real estate sales employees were terminated, in order to deprive them of benefits under the aforesaid employees welfare benefit plans, and such termination constituted discrimination and interference with protected rights, in violation of the provisions of ERISA.[1]

Arvida filed Motions to Dismiss the Complaint, asserting that the health insurance plan was not a pension plan, and that rights thereunder could not be vested, so that the protections of Section 510 of ERISA did not apply. Arvida also contended that since Seaman's rights to contributions already made into the 401(k) Plan remained vested, she had no right to continuing participation, and the protections of ERISA did not apply.

The District Court granted Arvida's Motion to Dismiss, agreeing with Arvida's argument that Plaintiff had no pending claims under the health plan, and no rights to any future benefit under the 401(k) plan, that entitlement to health insurance and future participation in the 401(k) plan were not vested or accrued benefits, and

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[1] Plaintiff's Complaint is included in the Appendix to this Brief at pp. 1a-7a.

therefore not subject to protection by Section 510 of ERISA.

Arvida did not urge in the District Court, and the District Court did not consider, any claim of business necessity, or any contention that Arvida's termination of Plaintiff was for any reason other than that alleged by Seaman.

The Court of Appeals reversed the decision of the District Court, noting that there was a wealth of authority that continued participation in an employee welfare plan was a right under ERISA, and that continued participation in a 401(k) plan was similarly a right protected under ERISA.[2] The Court of Appeals held that the plain language of Section 510 precluded termination where the object was to prevent or interfere with "the attainment of any right to which the participant may become entitled". The Court of Appeals went on to observe that

> The validity of a § 510 claim does not hinge upon whether the benefits involved are vested, but upon the purpose of the discharge. A plaintiff must show that the employer had the specific intent to interfere with the employee's right to benefits. (Petition, pp. A5-6.)

The Court of Appeals correctly noted that

> Seaman alleged that Arvida terminated her because she would not give up the right to continued participation in the health plan and for the specific purpose of interfering with her rights under ERISA. (Petition, p. A6).

Since this case arose on a Motion to Dismiss, Arvida did not present, and neither the District Court nor the Court of Appeals decided, the proof issues involved in

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[2] The Decision of the Court of Appeals is found in the Petition Appendix, pp. A1-10.

determining the employer's intent, business justification, or any other motive. As the Court of Appeals observed,

> . . . whether an employer intends to interfere with the employee's right to future benefits is a factual inquiry to be answered on a case-by-case basis. (Petition, p. A5).

The Court of Appeals did not hold, as Arvida suggests, that Arvida had violated ERISA, but simply that the Complaint had sufficiently alleged a violation of the statute. While some of the Court's observations may have been prompted by Arvida's concession of its intent to deprive Plaintiff of participation in the health insurance plan, the *holding* focused on the allegations of Seaman's Complaint.[3] Contrary to the assertions of Arvida, the Court of Appeals did not preclude the assertion of defenses, but merely, and correctly, found that the Complaint stated a claim within the plain language of Section 510 of ERISA.

Arvida's Petition for Rehearing and Suggestion of Rehearing En Banc was denied, no member of the Court of Appeals having requested a poll on rehearing en banc. Petition at pp. A12-13.

REASONS FOR DENYING THE WRIT

This case does not, contrary to Arvida's Petition, present a conflict with decisions of this Court, nor has Arvida shown that there is a conflict with a decision of another Court of Appeals on the same matter. Arvida claims a conflict, "in principle", with the "spirit" of cases

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[3] "Nevertheless, if Seaman's allegations are true, Arvida has violated § 510." (Petition, p. A9). Arvida complains in its Petition, at p. 11, fn. 7, that its "honesty" subjected it to *per se* Section 510 liability. As discussed *infra*, the Court of Appeals did not decide liability, but merely whether the Complaint stated a cause of action. Arvida's "honest admissions" as to its intent were much more candid in Briefs to the Court of Appeals. Plainly Arvida does not intend to make that mistake in this Court.

which indicate reluctance to create "new" causes of action, or expand damages or standing beyond that clearly expressed by Congress. This case is not inconsistent with those principles.

The Court of Appeals reversed the dismissal, on initial motions and before Answer, of a Complaint (Appendix to this Brief). Arvida overstates and misstates what the Court of Appeals did, the reasons given, and the potential consequences. Section 510 of ERISA *expressly* makes it unlawful to discharge a participant in an employee benefit plan, "for the purpose of interfering with the attainment of any right to which such participant may become entitled". 29 U.S.C. § 1132(a)(3) authorizes suit by a participant to enforce that prohibition, and for appropriate relief.

There is no conflict, "in principle" or otherwise, with *Massachusetts Mutual Life Ins. Co. v. Russell*, 508 U.S. ——, 113 S. Ct. 2063, 124 L.Ed.2d 161 (1993). Because this case is presented based only on the Complaint and Motion to Dismiss, there is no way there could be any conflict with the "burden of proof" or "mixed motive" cases such as *McDonnell-Douglas Corp. v. Green*, 411 U.S. 292 (1973) or *St. Mary's Honor Center v. Hicks*, 509 U.S. ——, 113 S. Ct. 2472, 125 L.Ed.2d 407 (June 23, 1993). Nor is there any colorable claim of pre-emption of state law. Arvida is grasping at straws.

I. NONE OF THE "QUESTIONS PRESENTED" IN THE PETITION IS ACTUALLY PRESENTED IN THIS CASE.

1. Contrary to the assertions in the Petition, the Court below did not recognize "an implied ERISA 'wrongful discharge' claim based solely upon loss of unaccrued, unvested, and prospective benefits"; it held only that an allegation that Plaintiff was discharged in order to deprive her of benefits from an employee welfare

benefit plan stated a claim within the plain language of Section 510 of ERISA, 29 U.S.C. § 1140. Thus, the first question was not presented.

2. Nor did the Court of Appeals hold that ERISA Section 510 prohibits an employer from restructuring its workforce to reduce payroll costs; as noted, the case as presented to the District Court and the Court of Appeals was premised on allegations that the object of the termination was to deprive Plaintiff of benefits and continued participation in employee welfare benefit plans, and Arvida conceded as much in the Court of Appeals. Accordingly, the second question is not presented.

3. Petitioners' third "Question Presented" misstates this case. While an employer may have the right to amend or change its plan, such is not an "absolute" right to amend the plan. The plan amendment could not violate the structural requirements of ERISA, for example, and might also be limited by provisions of Title VII, the Americans with Disabilities Act, or other specific protective legislation. A *discriminatory* amendment might well be unlawful. Arvida has not "achieved the same result" by converting *some* of its employees to independent contractors. The plans remain in effect, with (for purposes of this Petition) all of the same terms and conditions, except that Plaintiff and certain others have been terminated in order to prohibit them from participating. Had the plans been amended, across the board and with no discriminatory or other unlawful intent, an entirely different question would have been presented. That is not, however, this case.

4. Contarry to the implication of the Petition, the Court of Appeals did not consider, much less reject, the employer's "business justification" defense. Arvida seeks to have this Court review the Court of Appeals' reversal of the District Court's Order dismissing the Complaint on initial motions, and before Answer. "Business justification" has never been asserted, much less rejected, ex-

cept in this Petition. Although the Complaint alleges, as the statute requires, that the purpose of the termination was discriminatory, the Court of Appeals did not find it necessary to, and did not, determine a "business justification" *defense*. Rather, it simply found the Complaint sufficient. In an effort to obtain unwarranted review by this Court, Arvida has posed a question, and complained of a decision, which has not been presented; since this case arises on initial Motions to Dismiss, before Answer, consideration of this issue is premature, at best.

5. Contrary to the assertion in the Petition, the Court of Appeals did not hold that ERISA Section 510 creates or establishes benefit plan vesting beyond that contained in the statute or the plan documents. The question of whether the Plaintiff had "vested" rights under the plans in issue was a false issue raised in the District Court. The Court of Appeals correctly held that the statute prohibited intentional interference with rights to participate in whatever plan was then in effect, a holding which is clearly required by the statute, as numerous courts have held.

All that the Court of Appeals decided is that "an employer may not terminate an employee for the purpose of avoiding payment of plan benefits" (Petition at p. A7). It did not decide what those benefits might be. Bearing in mind that this case arises on a Motion to Dismiss, and that the allegations of the Complaint must be taken as true, the Court of Appeals holding is clearly correct, and presents no question that this Court should consider at this juncture.

The gist of the Court of Appeals decision, contrary to Petitioners' mischaracterization, is found in the Petition, at p. A9:

> If the employer decides to offer benefits, it must allow its employees to take advantage of the plan and must administer the plan in a nondiscriminatory

fashion. But the employer can make the initial decision whether to offer any benefits at any time. Nevertheless, if Seaman's allegations are true, Arvida has violated § 510. Arvida did not change the terms of its plan; rather, it threatened to terminate its salespeople unless they agreed to become independent contractors, performing the same job but ineligible to receive the benefits previously offered to them as employees and still offered to Arvida's remaining employees. It terminated plaintiff for declining to work without the benefits she previously enjoyed though offered to remaining employees. Plaintiff was, in the exact language of § 510, discharged "for exercising [a] right to which [she was] entitled under the provisions of an employee benefit plan." To excuse this action would prevent § 510 from fulfilling its congressionally intended purpose. That Arvida, by changing the terms of its plan, lawfully could have deprived its salespeople of these benefits does not allow it to offer benefits but prevent its salespeople from taking advantage of those benefits on pain of discharge.

II. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT, OR BETWEEN THE COURTS OF APPEAL.

A. Introduction.

Despite the apocalyptic language and expansive claims asserted by Arvida in its Petition for Certiorari, the issue presented in this case is really quite narrow. The Court of Appeals reversed the decision of the District Court granting a Motion to Dismiss the Complaint, because the District Court misconstrued the provisions of Section 510 of ERISA to apply only to vested benefits, essentially pension plans. The District Court failed to appreciate that Section 510 applied to employee benefit plans, which are broadly defined in the statute [4] and specifically include the type of plans at issue here.

---

[4] 29 U.S.C. § 1002(3). It includes *both* pension plans and welfare plans, or combinations of plans.

The Court of Appeals found that Plaintiff's Complaint stated a claim within the plain language of the statute, and reversed the dismissal of the Complaint. The broader questions urged by Arvida go far beyond the issues presented to, and decided by, either the District Court or the Court of Appeals. Indeed, reading the Petition would cause one to believe that this case had been tried, resulting in a judgment for Plaintiff after the District Court had either directed a verdict, stricken defenses, or instructed the jury that the employer's "business justification" should not be considered, or was not sufficient as a matter of law. As noted, this case arises on a Motion to Dismiss the initial Complaint, before Answer, and "business justification" has not been raised, much less established.

B. The Court Of Appeals Did Not Depart From Settled Law Or Conflict With Other Courts Of Appeal In Reversing Dismissal Of The Complaint.

The Court of Appeals determination that Section 510 of ERISA applies to employee welfare benefit plans, including health insurance plans—a determination that Petitioner does not directly challenge in its Questions Presented—is firmly grounded in the plain language of the statute, and the decisions of numerous Courts of Appeals. Contrary to Arvida's claim, the Court of Appeals decision does not strip employers of a "business necessity" defense, or determine ultimate liability. The Court of Appeals specifically premised its conclusion on the assumption that Plaintiff's allegations would be proven. The determination as to whether the employer's intentions and actions were lawful or unlawful remains for the trier of fact. All the Court of Appeals has decided is that the Complaint states a claim for relief, and that further proceedings will be required.

C. The Court Of Appeals Correctly Determined That Section 510 Of ERISA Applies To Welfare Plan Benefits.

This case does not require review because of some perceived inconsistency with the "spirit" of ERISA. Contrary to the suggestion of Petitioner, the cause of action Plaintiff brings is expressly authorized by the statute. It is neither "implied" nor somehow "inconsistent" with the "spirit" of the overall statute. Rather, it is a conclusion which is inescapable from the plain language of the statute.

When Congress provided that it would be unlawful for an employer to terminate an employee (participant)

> ". . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . ."

and then authorized a participant to bring an action for violation of the statute, 29 U.S.C. § 1132(a)(3), it plainly anticipated that an employee could bring an action for termination where the object of the termination was a violation of ERISA. Although Petitioner claims a conflict in the Circuit Courts of Appeal, it cites no case in which a court has held that an employee/participant may not complain of his termination, where such termination is claimed to be *for the purpose of* depriving him of welfare plan benefits.[5]

To the contrary, as noted by the Court of Appeals, a number of Courts of Appeals have held that an employer violates Section 510 by discharging employees to prevent them from taking advantage of benefits which are not yet

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[5] The Court of Appeals noted (Petition, p. A6-7) that the instant case was factually distinguishable from *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 113 S. Ct. 482, 121 L.Ed.2d 387 (1992) and *Owens v. Storehouse, Inc.*, 984 F.2d 394 (11th Cir. 1993), which involved amendments to the plan, rather than termination of employees. Arvida seems unable, or unwilling, to grasp the distinction.

vested (Petition, at p. A5). Plainly, there is no conflict in the Circuits on this point. Arvida's attempt to re-characterize Plaintiff's claim to present the appearance of conflict between the Courts of Appeals should be rejected.

As noted, Arvida argued to the District Court, and the District Court accepted, the proposition that Section 510 of ERISA protects only vested rights, essentially rights under pension plans. Accordingly, since Plaintiff was principally complaining of termination to deprive her of benefits in an employee welfare benefit plan, rather than a vested pension plan, the District Court concluded that she stated no claim.

As the Court of Appeals observed, however,

> The parties do not dispute that before her termination Seaman was an employee entitled to participate in Arvida's benefits plan, or that the health insurance and 401(k) plan are included in the phrase, "employee benefit plan," and thus are covered by ERISA. (Petition, at p. A3).

Clearly, if Congress had intended Section 510 to apply only to rights under pension plans, it would have used used the term "employee pension benefit plan" rather than the broader term "employee benefit plan". Section 3 of ERISA, 29 U.S.C. § 1002(2) and (3). After reviewing and approving numerous cases where other Courts of Appeals had applied Section 510 to benefit plans where the benefits were not vested, the Court of Appeals observed

> "We agree with the reasoning of the Fourth Circuit in *Conkwright* which held that Congress did not intend to leave employees unprotected once their rights were vested and that § 510 prohibits the employer from discharging an employee for the purpose of preventing the employee from receiving additional vested benefits. 933 F.2d at 238. The Fourth Circuit's conclusion is consistent with § 510's language,

which protects "the attainment of any right to which such participant may become entitled" . . . The validity of a § 510 claim does not hinge upon whether the benefits involved are vested, but upon the purpose of the discharge." (Petition A5).

D. Arvida's "Business Necessity" Claim Has Not Been Rejected; It Has Not Even Been Made.

Finally, and perhaps most significantly, the issues Arvida suggests are at best premature. The District Court properly should consider the allegations of the Complaint as true, and the Court of Appeals has correctly determined that they are sufficient to state a claim. The Court of Appeals did not hold that Plaintiff would necessarily win, unless of course, "Seaman's allegations are true" (Petition A9). This is not unusual. As a general rule, if a Plaintiff proves her case, she is supposed to win.

In attempting to create a fictional conflict in the Courts of Appeals. Arvida raises a "business necessity" defense, and implies that this defense has been stricken, barred, or rejected. Arvida makes numerous references throughout its Petition to what it characterizes as *Plaintiff's* claim, allegations, or admissions. These are actually the "spin" Arvida now tries to place on the Complaint.

In order that this Court may appreciate the allegations Plaintiff did make, which the Court of Appeals clearly understood, we have attached as Respondent's Appendix a copy of the Complaint. The Plaintiff's allegations clearly accused the employer of terminating her in order to deprive her of ERISA benefits, or the right to participate in ERISA plans. These other matters, Arvida's effort to reduce its payroll costs (Petition p. 6), that Arvida was involved in a reduction in force to reduce payroll costs (Petition p. 7), or that the restructuring of its sales force was motivated by its goal of reducing payroll expenses, including reduction of future benefit costs (Petition p. 7) are Arvida's claims in this Court, not Plaintiff's claim below.

In an effort to obtain unwarranted review by this Court, Arvida attempts to recharacterize Plaintiff's Complaint, and misconstrue the decision of the Court of Appeals. We respectfully suggest that if this Court reviews the allegations of the Complaint, and the decision of the Court of Appeals, Arvida's shabby effort to distort and confuse will be apparent. Plaintiff did not claim, and the Court of Appeals did not hold, that an employer's decision to restructure its workforce violates ERISA whenever it impacts, however slightly, on employee benefits. Plaintiff did not claim, and the Court of Appeals did not hold, that any employee who is ever fired has an ERISA claim. As the Court of Appeals took great pains to note, the ERISA claim, set out in the plain language of the statute, requires an allegation of a specific intent [6], to interfere with plan rights or benefits to which the participant is, or may become, entitled to. Plaintiff's Complaint does so, as the Court of Appeals correctly found.

Accordingly, this Court should deny the petition for certiorari.

CONCLUSION

Since the Plaintiff's Complaint specifically alleges that her termination was for the purpose of depriving her of rights to which she might become entitled under an employee benefit plan, in violation of Section 510 of ERISA, the Court of Appeals correctly held that it stated a claim and reversed the District Court. In doing

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[6] As the Court of Appeals noted:

> "A plaintiff must show that the employer had the specific intent to interfere with the employee's right to benefits. This standard does not require the plaintiff to show that interference with ERISA rights was the sole reason for discharge, but does require plaintiff to show more than the incidental loss of benefits as a result of the discharge." (Petition A5-A6, citations omitted).

That, as the Court of Appeals recognized, occurs on a case-by-case basis, and is plainly inappropriate for decision by this Court on the state of these pleadings.

so, the Court of Appeals corectly determined that the District Court had erred in assuming that Section 510 of ERISA applied only to participation in plans with vested benefits. Arvida has shown no basis for this Court to review the decision of the Court of Appeals, or to reverse.

This case simply does not present the issues stated in Petitioner's "Questions Presented", let alone an issue which is appropriate for consideration by this Court. The rulings below involve the sufficiency of the allegations of the Complaint, prior to Answer. The Petition for Certiorari should be denied.

Respectfully submitted,

FRANK E. HAMILTON, JR.
(Counsel of Record)
FRANK E. HAMILTON, III
FRANK HAMILTON &
ASSOCIATES, P.A.
2620 West Kennedy Boulevard
Tampa, Florida 33609
(813) 879-9842
Counsel for Respondent

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 89-999-Civ-T-17c

PATRICIA SEAMAN,
Plaintiff,

v.

ARVIDA REALTY SALES, INC., a Florida corporation, ARSLP, INC., an Illinois corporation, and ARVIDA REALTY SALES, LTD., a Delaware limited partnership,
Defendants.

COMPLAINT

COMES NOW the Plaintiff, PATRICIA SEAMAN, a natural person, and brings this action against Defendants ARVIDA REALTY SALES, INC., a Florida corporation, ARVIDA REALTY SALES, LTD., a Delaware partnership, and ARSLP, INC., an Illinois corporation, and alleges:

1. Plaintiff is a natural person, a citizen of the United States and State of Florida, and a resident of the Middle District of Florida at all times material herein.

2. Defendant ARVIDA REALTY SALES, INC. is a Florida corporation, at all times material herein doing business within the Middle District of Florida, Tampa Division.

3. Defendant ARSLP, INC. is an illinois corporation, and upon information and belief a general partner of

ARVIDA REALTY SALES, Ltd., a Delaware limited partnership, both of whom were, at all times material herein, doing business within the Middle District of Florida, within this division.

4. Plaintiff was employed for many years by ARVIDA REALTY SALES, INC., or connected or affiliated entities or enterprises, as a real estate salesman, within the Middle District of Florida. At all times material herein she was a satisfactory employee and a substantial producer of real estate sales commission income, both to herself and to her employers.

5. Shortly before May 1, 1989, Plaintiff was notified that she, and all of the other sales employees of Defendants in the Sarasota area would be terminated as employees of Defendants. The stated reason for the termination was in order to eliminate the cost of providing health insurance coverage to the sales employees (and employer 401(k) and FICA contributions), and the terminated employees would be offered contracts as "independent contractors" but without certain benefits previously available, but with all other terms and conditions of employment substantially the same. Shortly thereafter the employees, including your Plaintiff, were terminated.

COUNT I

VIOLATIONS OF ERISA

Plaintiff realleges the allegations of Paragraphs 1 through 5 as fully and completely as though restated herein, and further asserts:

6. This is an action for damages and such other relief as Plaintiff may be entitled pursuant to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, et seq. (hereafter ERISA). This Court has jurisdiction pursuant to 29 U.S.C. 1132(f), and 28 U.S.C. 1331 and 1337.

7. At all times material herein, up to her termination, your Plaintiff and the other sales employees were participants in employee health insurance programs sponsored by defendant employers, Defendants heerin, which plan of health insurance was an employee welfare benefit plan within the meaning of ERISA.

8. Until her termination, Plaintiff and the other sales employees were also participants in a 401(k) Plan, sponsored by the defendant employers, which 401(k) Plan was an employee welfare benefit plan within the meaning of ERISA.

9. Plaintiff and the other real estate sales employees were terminated, in order to deprive them of benefits under the aforesaid employee welfare benefit plans, and such termination constituted discrimination and interference with protected rights, in violation of the provisions of ERISA.

10. As a result of her termination, Plaintiff has been damaged in that she has lost income and earning potential, has been deprived of health benefits and contributions to and benefits resulting from her participation in the 401(k) Plan, and such losses and damages are continuing.

11. In order to protect her rights, and to obtain redress, Plaintiff has been obligated to employ the services of Frank Hamilton & Associates, P.A., and is obligated to pay such lawfirm reasonable attorney fees.

COUNT II

RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT

Plaintiff realleges the allegations of Paragraphs 1 through 11 as fully and completely as restated herein, and states:

12. This is an action for damages for violation of provisions of the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. 1961, et seq (hereafter RICO). This Court has jurisdiction pursuant to the provisions of 18 U.S.C. 1964(c), 28 U.S.C. 1331 and 28 U.S.C. 1337.

13. Defendants are an enterprise, and engage in, or the activities of which affect, interstate commerce within the meaning of RICO.

14. Defendants, and other persons, corporations and limited partnerships associated with them, whose identities are presently unknown, have engaged in a pattern of racketeering activity, as defined in 18 U.S.C. 1961, in order to acquire and maintain control of such enterprise, and have participated in the conduct of such enterprise and affairs through a pattern of racketeering activity, and have conspired to do so.

15. In order to carry out the pattern of racketeering activity, which includes the aforesaid violations of ERISA, Defendants have deprived employees of rights and benefits under ERISA, in order to coerce or compel such employees to continue in the services of the Defendants, without payment of or participation in such employee welfare benefit plans, by changing their employment status for the purpose of avoiding the obligation to collect and remit income tax withholding and collect and pay social security contributions, and to pay the cost of continued participation in the aforesaid employee welfare benefit plans, in order to reduce their expenses and increase their profits.

16. In furtherance of the conspiracy, and in order to compel your Plaintiff to waive or release her rights under ERISA, and other actions or claims she may have, Defendants have wilfully and without excuse failed and refused to pay Plaintiff earned commissions, and have withheld portions of commissions, and insisted upon a release of all claims or rights as a condition to paying

your Plaintiff what she is entitled to. Such threats and unlawful acts have been communicated or effected through mail and telephone communication, and such acts constitute mail and wire fraud, and are related predicate acts within the meaning of 18 U.S.C. 1961, et seq.

17. Your Plaintiff has been the victim of such conspiracy in that she was terminated by Defendants, in order to carry out the violation of ERISA and the attempt to coerce her, and a successful attempt to coerce other employees, into relinquishing rights under ERISA, and reducing their earnings, so as to reduce expenses and generate profits for Defendants. As a proximate consequence thereof, she has lost income and earnings (including all other benefits of such employment) and additionally been deprived of commissions to which she is entitled.

18. Such pattern of racketeering activity, which involved and injured persons other than your Plaintiff, is a regular and continuing pattern of activity, within the meaning of RICO.

COUNT III

PENDANT CLAIM FOR WAGES AND COMMISSIONS

Plaintiff realleges the allegations of Paragraphs 1 through 18 as fully and completely as though restated herein, and further alleges:

19. This is an action for damages for failure to pay earned wages and commissions. This Court has pendant jurisdiction, as it arises out of a common nucleus of related facts to the counts under which this Court has original jurisdiction.

20. Plaintiff was entitled to and has earned, commissions as a result of sales made, but not consummated, prior to her termination, pursuant to the terms of her

employment. Defendants approved the amount of her commissions, in accordance with the contractual arrangements.

21. Defendants have failed and refused to pay Plaintiff the commissions which are due her, by making unlawful deductions, and withholding not less than 20% of the commissions due her in each instance. Such unlawful withholding is continuing, and upon information and belief Defendant will continue to unlawfully withhold Plaintiff's commissions in furtherance of the conspiracies and unlawful activities set forth above.

COUNT IV

FLORIDA CIVIL THEFT STATUTE

Plaintiff reallages the allegations of Paragraphs 1 through 21 as fully and completely as though restated herein, and further alleges:

22. This is an action for damages pursuant to F.S. 772.104 and F.S. 772.11. This Court has pendant jurisdiction, as the acts complained of arise out of a common nucleus of related facts under which this Court has original jurisdiction.

23. Defendants are an enterprise within the meaning of F.S. 772.102(3).

24. The actions of Defendants constitute a pattern of criminal activity, within the meaning of F.S. 772.102(4) and Defendants have engaged in at least one other incident of criminal activity, as defined in F.S. 772.102(1), having similar intents, results, accomplices, victims and methods.

25. The actions of Defendants constituted a violation of F.S. 772.103 and F.S. 812.014(1), and as a consequence, Plaintiff has been damaged.

WHEREFORE, Plaintiff prays for damages against Defendants, in the amount of actual damages for lost

wages or commissions, lost insurance benefits and other benefits to which she is entitled under the employee welfare benefit plans, injunctive relief, treble damages under RICO and the Florida Statutes, attorney fees and costs of this action, and such other relief as she may be entitled in the premises.

Respectfully submitted,

/s/ Patricia Seaman
PATRICIA SEAMAN

/s/ Frank E. Hamilton
FRANK E. HAMILTON, III
Florida Bar No. 147112
FRANK HAMILTON & ASSOCIATES, P.A.
2620 West Kennedy Blvd.
Tampa, Florida 33609-3294
813/879-9842
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Jury trial is demanded as of right as to all matters so triable.

/s/ Frank E. Hamilton, III
FRANK E. HAMILTON, III, ESQUIRE